No. 3936.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of
J. H. McNEICE and FRED McNEICE,
Individually and as Copartners,
Doing business under the name and
style of McNEICE FURNITURE CO.,
Bankrupts.

DOLPH BARNETT, as Trustee of J. H. McNEICE and FRED McNEICE, Individually and as Copartners, doing business as McNEICE FURNITURE COMPANY, Bankrupts,

Appellant,

vs.

O. A. SPROAL,

Appellee.

BRIEF OF APPELLANT

NELSON R. ANDERSON,
Attorney for Appellant.

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Seattle, Washington

THE HOLLY PRESS, SEATTLE

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Appellant,

vs.

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Appellee.

BRIEF OF APPELLANT

NELSON R. ANDERSON,
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STATEMENT OF THE CASE.

This is an appeal from an Order of the District Court allowing the claim of Appellee for rent as a preferred claim from June 1st. to July 21, 1921 (date of filing involuntary petitions in bankruptcy), the allowance of $300.00 per month on *quantum meruit* as expenses of administration from July 21st. to Oct. 5, 1921, and from allowing any charge for rent after Appellee's leasing said premises on Oct. 1, 1921.

The undisputed facts are as follows:

July 21, 1921, involuntary petitions in bankruptcy were filed.

August 13, 1921, adjudication was entered.

September 10, 1921, a Trustee was elected.

October 4, 1921, the merchandise and fixtures of the bankrupt estate were sold and possession was given the purchaser and the premises of the landlord were vacated by the Trustee. (R. 14).

September 10, 1921, Appellee landlord filed with the Referee a general unsecured proof of claim

upon a printed form prescribed by the United States Supreme Court for general unsecured claims, with a statement attached reading as follows:

> "On December 30, 1919, the said bankrupts entered into a written lease with O. A. Sproal whereby they rented from him two storerooms located at 117 and 119 East A. Street and one storeroom located at 102 North 2nd. Street, the same being a part of the building owned by said Sproal; that the agreed rental was $375.00 per month; that no rental has been paid for the months of June, July, August and September. The Bankrupts occupied said building until sometime in July, the exact date being unknown to deponent. When they made an assignment for the benefit of creditors and the assignee has since occupied said rooms, and still occupies
>
> them under the terms of the lease.
>
> | | |
> |---|---|
> | June Rental | $ 375.00 |
> | July Rental | 375.00 |
> | August Rental | 375.00 |
> | September Rental | 375.00 |
> | | $1500.00 |

(R. 2-4).

This claim was objected to by the Trustee, who set up that on and after the filing of the petitions in bankruptcy that the merchandise and fixtures had been moved out of the front part of said store facing on Second Avenue and into the rear room facing on A. Street; that a reasonable rental value

of said premises was not to exceed $100.00 per month. (R. 6-8).

A hearing was had before the Referee who entered an order allowing said claim as a *preferred* claim at the rate of $375.00 per month from June 1, 1921, to August 13, 1921, (the date of the adjudication) amounting to $907.45, and at the rate of $300.00 per month upon *quantum meruit* from August 13, to October 5, 1921, amounting to $518.39, as part of the expenses of administration. This order was entered December 9, 1921, and was duly excepted to by the Trustee. (R. 9).

A petition for review was promptly filed by the Trustee, and allowed by the Referee. (R. 10-11).

Upon the review Judge Rudkin modified the Order of the Referee to the extent of allowing as a preferred claim the rent from June 1, 1921, to July 21, 1921, (date of filing petitions, instead of date of adjudication as Ordered by Referee) under the terms of the contract at the rate of $375.00 per month, and from the latter date until October 5, 1921, at the rate of $300.00 per month. (R. 14-15). An order was entered accordingly. (R. 12-13). From said Order this Appellant has appealed.

ASSIGNMENTS OF ERROR.

I.

The Court erred in approving the ruling of the Referee allowing the claim of O. A. Sproal as a preferred claim from June 1, 1921, to July 21, 1921, for the reason that said claim was not a lien or preferred claim from June 1, 1921, to July 21, 1921, as allowed by the Court, said claim having been filed with the Referee on September 13, 1921, and could be a preferred claim only by virtue of Chapter 165, Session Laws of 1917, State of Washington, limiting in point of time a claim for rent entitled to priority as follows: "Such lien shall not be for more than two months rent due or becoming due, nor for any rent or any installment thereof which has been due for more than two months," [17] and hence said lien was of two months' duration next preceding the filing of said claim, namely, the two months preceding the filing of said claim on September 13, 1921.

II.

The Court erred in not entering an order allowing said claim as follows:

June 1, to July 10, 1921, at $375.00 per month, as a general claim $507.92
July 10, to July 21, 1921, claim entitled to priority 120.97
July 21, to Oct. 1, 1921, expenses of Administration @ $100.00 per month 233.33

for the reasons stated in Assignment No. I.

III.

The Court erred in allowing said claim at the rate of $300.00 per month from July 21, 1921 (adjudication) to October 5, 1921 (surrender of premises) as a reasonable rental on *quantum meruit* as part of the expenses of administration, for the reason that an allowance of $300.00 per month as a reasonable sum is not sustained by the evidence and is contrary to the evidence, and in no event should any allowance have been made for October 1st to October 5th, as said claimant had executed a written lease on September 1, 1921, leasing said premises from October 1, 1921, for five years and had collected rent from October 1st to December 31, 1921.

IV.

The Court erred in not finding and in not allowing a charge for rent at a rate not exceeding $100.00

per month as a reasonable rental on *quantum meruit* from July 21, 1921 ~~(adjudication),~~ to Oct. 1, 1921 (date landlord parted with leasehold), as part of the expenses of administration, [18] for the reason that the reasonable rental value of said premises during said time did not exceed $100.00 per month as is shown by the evidence. (R. 17-19).

ARGUMENT.

I.

The Trustee contends that the Court was in error in allowing the claim of the Appellee landlord as a preferred claim from June 1, 1921, to July 21, 1921, (date of filing petitions in bankruptcy).

The claim of the landlord was filed as a *general, unsecured* claim upon a printed form prescribed for general unsecured claims, with a typewritten statement attached quoted in the first part of this brief, claiming rent for June, July, August and September, under the terms of the lease at $375.00 per month. It was executed and filed September 10, 1921. (R. 2-5).

At common law landlords were not entitled to a lien for rent.

Henderson vs. Mayer, 225 U. S. 631, 56 L. ed. 1233, 32S. Ct. 699.

24 Cyc. 1244.

Collier on Bankruptcy, pg. 1054.

The Appellee landlord might have filed a claim as a prefered claim and asked that it be held a lien on the assets of the bankrupt for a period of two months, provided said rent or installment thereof had not been due for more than two months under Chapter 165 of the Session Laws of 1917, State of Washington, (Sec. 1203 Rem. Comp. St., Wash.) reading as follows:

> "LIEN FOR RENT—PROPERTY SUBJECT—EXTENT OF LIEN. Any person to whom rent may be due, his executors, administrators or assigns shall have a lien for such rent which is paramount to, and has preference over, all other liens except liens for taxes, general and special liens of labor and mortgages or conditional bills of sale duly recorded prior to tenancy upon personal property of the tenant which has been used or kept on the rented premises, except property of third persons delivered to or left with the tenant for storage, repair, manufacture or sale, and such property exempt from execution by the laws of the state of Washington. Such liens shall not be for

more than two months' rent due or to become due, nor for any rent or installment thereof which has been due for more than two months; that no writing or recording shall be necessary to create such lien; and if such property be removed from the rented premises and not returned to the owner, agent, executor, administrator, or assign said lien shall continue and be a superior lien on the property so removed for ten days from the date of its removal, and said lien may be enforced against the property wherever found. In the event the property contained in the rented premises be destroyed by fire or other elements, the lien shall extend to any money that may be received by the tenant as indemnity for the destruction of said property, nor shall the lien be lost by the sale of the said property, except merchandise sold in the usual course of trade or to purchasers without notice of the tenancy. The provisions of this act shall not apply to, nor shall it be enforced against, the property of tenants in dwelling-houses or apartments or any other place that is used exclusively as a home or residence of the tenant and his family.

"2. ENFORCEMENT. Said lien may be enforced in the same manner as the foreclosure of a chattel mortgage in the superior court of the county in which the property or any portion thereof is situated."

A

But Appellee filed his claim as a general, unsecured claim thereby waiving his security or right to priority.

Collier on Bankruptcy (12 ed.) pg. 1016.

7 C. J. 338.

In re Fisk, 185 Fed. 974.

Brown vs. City Natl. Bank, 72 Misc. 201, 131 N. Y. S. 592, 26 A. B. R. 638.

B

As above stated this claim was filed on Sept. 10, 1921. At that time Appellee might have claimed a lien for rent due from July 10 to Sept. 10, 1921, or, more properly, might have filed a claim for rent as a lien claim from July 10, to July 21, 1921, (date of filing petitions in bankruptcy) and a petition for an allowance for rent as an expense of administration from July 21, to Oct. 1, 1921.

Trustee contends that the Washington statute fixes (1) a period of duration for a lien at two months and (2) also is a statute of limitations of two months, during which foreclosure must be commenced. We do not see how any other construction can be put upon the language of the statute, especially

> "Such lien shall not be for more than two months rent due or becoming due, *nor for any*

rent or any installment thereof which has been due for more than two months."

Lien statutes commonly provide for a period of duration of the lien and a time within which foreclosure must be commenced. It seems plain to us that this statute makes such a provision and that a lien can be claimed for not more than two months and that it must be foreclosed as to any installment before that installment is more than two months old. If this is not a true construction, then what meaning can be given to the words:

> "Nor for any rent or any installment thereof which has been due for more than two months."

Such is the construction given this statute by the Superior Court of the State of Washington in *Culp vs. McMehan,* now on appeal to the Supreme Court, wherein a decision may be expected any day.

The fact that bankruptcy intervened on July 21, does not affect the rights of either party. The landlord could have foreclosed his lien at any time in the State Court.

In re. San Gabriel Sanitarium, 111 Fed. 892 (9 C. C. A.).

Bankruptcy does not abate or prevent lien foreclosures in the State Court.

Collier on Bankruptcy (12 ed.) pg. 1051-1053.

To secure a lien given by statute one must bring himself within the terms of the statute and a receivership does not alter the rule.

Brown vs. Hunt & Mottet Co., 111 Wash. 564, 191 Pac. 860.

The landlord could have filed his petition with the Referee asking foreclosure of his lien. The Federal Court has jurisdiction.

Rem. on Bankruptcy, Sec. 1885-1888.

If bankruptcy had not intervened, it is obvious that the landlord on Sept. 10, 1921, had lost his lien for rent for the month of June and from July 1 to July 10. He could only claim a lien for two months between July 10 and Sept. 10. Had he gone into the State Court to foreclose his lien that is the utmost relief to which he was entitled. Instead, he filed his claim in bankruptcy with the Referee on Sept. 10, and has no greater rights in the bankruptcy court than he would have in the State Court.

II.

The Referee found that a reasonable rental for said premises was $300.00 per month and the District Court affirmed this ruling of the Referee and modified the Order so as to run from July 21 to Oct. 5.

The record is very short and gives the testimony of the witnesses within the compass of nine pages (R. 21-29). As a matter of law we submit the testimony of Appellee was incompetent to show the *quantum meruit* value of the premises occupied by the Trustee from July 21, 1921, to Oct. 5, 1921. The occupancy was temporary as all knew. It was used as a place of storage. Appellee's testimony was solely upon the basis of its value in a long time lease, say a 5 year lease. On the other hand, Appellant's witnesses testified to its value for temporary occupancy. This was to the point and fixed the real value of the premises within the contemplation of the parties and the law. The Trustee believes no weight should be given to testimony fixing the value of the premises on the basis of the value of a long term lease. The only testimony as to value for temporary purposes was that the fair market rental was $100.00 per month.

The estate is not liable under the lease but on *quantum meruit.*

In re Fraser, 183 Fed. 28.

Collier on Bankruptcy (12 ed.) pg. 982.

The assets of this estate were less than $4000.00 and to charge this estate with $1378.89 for rent is oppressive and unjust; especially in view of the injunctions of the Act for economy.

III.

The claim filed by Appellee was for rent for June, July, August and September. (R. 2-5). It did not cover any part of October. Nor was an amended claim filed. The Referee allowed said claim to and including Oct. 5, and the Order was affirmed by the District Court. It is undisputed and is admitted by Appellee that on Sept. 1, 1921, the landlord executed a lease to said premises with one Simon, said lease to commence Oct. 1, and that said Simon had paid the rent from Oct. 1 to January 1. (R. 27-29). In fact, Mr. Simon moved his stock of goods in cases into the premises about the middle of September and occupied the front half of the store from that time on until the Trus-

tee sold the Bankrupt's goods and fixtures on Oct. 4. No compensation was allowed the Trustee in Bankruptcy for such occupancy.

The Trustee contends that the landlord is not entitled to collect any rent from this estate after Oct. 1. On Oct. 1, Appellee parted with his leasehold interest. After Oct. 1 the leasehold was the property of the lessee Simon. The landlord had parted with title and could not possibly be entitled to rent from both Simon, from whom he actually collected, and also from the bankrupt estate. To permit it is to allow Appellee to collect double rent for the same period for the same premises. This is obviously unjust and without any legal basis.

This would reduce the sum alowed the landlord by $50.00—5 days rent at $300.00 per month or $10.00 per day.

In conclusion we submit that claim for rent as a preferred claim prior to bankruptcy was waived the same as a suit filed in any Court making no allegations setting up a right of lien and no prayer for foreclosure of a lien is held a waiver of lien.

If not, if Appellee is entitled to a lien at all, the claim should be allowed as follows:

June 1-July 10, General claim @ $375.00	$507.92
July 10-July 21, Secured claim @ $375.00	120.97
July 21-Oct. 1, Trustee's expense of Administration @ $100.00 per month	233.33
Oct. 1-Oct. 5, Disallowed, (premises leased) Oct. 1 and paid by lessee	000.00

Respectfully submitted,

NELSON R ANDERSON,

Attorney for Appellant.